resort to the federal act has been had by the filing of a petition,[11] this view, besides defeating that uniformity which the National Act was designed to establish, may also be opposed on the ground that it permits expensive proceedings to be had under one law, subject to being nullified by a resort at the option of either party to the other.

It is true, however, that the right of a debtor to make a voluntary common law assignment for the benefit of his creditors is not affected by the passing of a national bankruptcy act,[12] and that state assignment laws which merely prescribe the methods of making such an assignment may stand in the face of federal legislation, although other provisions of a state insolvency system of which they form a part must fall.[13] Such assignments are valid until attacked by appropriate proceedings under the federal law.[14] The reason for this distinction will be found in the fact that such assignments gain their vitality from the free act and deed of the debtor, and would exist entirely independent of any state legislation, while state insolvency proceedings, on the other hand, depend for their potency on a positive system of insolvency inaugurated by the state.[15] The National Bankruptcy Act does not affect the common law rights of individuals unless they come into direct conflict with its operation, but it is not at all inconsistent to hold that state laws are *ipso facto* suspended by the federal act, even though the latter have not been invoked in the particular case in question.

Accordingly the court in the recent case of *Continental Building and Loan Ass'n* v. *Superior Court* (Cal. 1912) 126 Pac. 476 was undoubtedly correct both in its suggestion that all state insolvency laws are *ipso facto* suspended by the National Bankruptcy Act, and in its holding that provisions which look to the winding up of corporations for acts having no reference to insolvency are not affected thereby, even though the means adopted are those frequently applied to insolvency proceedings.

RIGHT OF LABOR UNIONS TO STRIKE FOR THE ENFORCEMENT OF THE CLOSED SHOP.—The right of every man to be free from molestation in the pursuit of his vocation[1] or in the conduct of his business,[2] prohibits any interference with either unless some justification is shown. Such a justification is the inherent right of an employer to conduct his busi-

[11]Reed Bros. *v.* Taylor (1871) 32 Ia. 209; Maltbie *v.* Hotchkiss (1871) 38 Conn. 80; Jensen-King-Bird Co. *v.* Williams (1904) 35 Wash. 161; Louisville Co. *v.* Landman (1909) 135 Ky. 163. It is to be noted that in all these cases save that last cited, the court was considering merely a voluntary assignment regulated by state statute, though the language used indicates a broader application of the rule laid down.

[12]Pogue *v.* Rowe (1908) 236 Ill. 157; Reed *v.* McIntyre (1878) 98 U. S. 507; Cook *v.* Rogers (1875) 31 Mich. 391; Mayer *v.* Hellman (1875) 91 U. S. 496; Bostwick *v.* Burnett (1878) 74 N. Y. 317.

[13]Randolph *v.* Scruggs *supra;* Binder *v.* McDonald (1900) 106 Wis. 332.

[14]Hilliard *v.* Shoe Co. (1903) 76 Vt. 57; Mayer *v.* Hellman *supra;* Thompson *v.* Shaw (1909) 104 Me. 85.

[15]*In re* Sievers (1899) 91 Fed. 366; Mayor *v.* Hellman *supra.*

[1]Note to Reynolds *v.* Cassidy (Mass. 1908) 17 L. R. A. [N. S.] 162; Perkins *v.* Pendleton (1897) 92 Me. 166; Hodge, Wrongful Interference with Third Parties, 28 Am. L. Rev. 47.

[2]8 COLUMBIA LAW REVIEW 496; Folsom *v.* Lewis (1911) 208 Mass. 336; Printing Co. *v.* Cassidy (1902) 63 N. J. Eq. 759, 764.

ness as he sees fit, hiring and discharging at will,[3] or the correlative right of an employee arbitrarily to refrain from work.[4] It is, therefore, almost universally true that one who is injured by another's refusal to work, cannot complain,[5] and this admitted rule serves as the chief argument of those courts which uphold the legality of a strike or boycott, on the ground that an act which is lawful on the part of an individual cannot become unlawful merely because a number of persons join in it.[6] But although the natural reluctance of the courts to interfere with the liberty of the individual has prevented any examination into his motives in choosing where and when he will work, and has caused his right thus to choose to be regarded as absolute in nature,[7] this should not preclude all right of action against a combination which has unjustifiably interfered with the plaintiff's right to work. The concerted action of a union necessarily involves a surrender of individual volition to the will of the majority, which justifies an inquiry into the purposes of the combination.[8] Moreover, the enormous coercive power of a combination, which is far in excess of the sum of that of the individuals composing it, requires that it should not be exercised for purposes of oppression.[9] For these reasons, courts have generally recognized that what is lawful for one may become unlawful when done by many.[10] Therefore a fellow employee may enjoin even a peaceful strike when its purposes are wrongful and illegal.[11] So also, an employer may prevent a secondary strike or boycott as an unlawful interference with his right to carry on his business,[12] although the courts have probably never permitted an employer to object to a primary strike, on the ground that even a combination may arbitrarily choose for whom it will work, so long as no third person is injured by such a choice.

Even if the illegality of a strike for the sole purpose of injuring others be admitted, however, no exact line of demarcation has been drawn between objects which a union may lawfully strike to attain as incidental to legitimate competition, and those which are obnoxious as constituting undue oppression of the individual. Since the primary

---

[3]Adair *v.* U. S. (1907) 208 U. S. 161; People *v.* Marcus (1906) 185 N. Y. 257.

[4]Furniture Co. *v.* Union (1905) 165 Ind. 421; D. L. & W. Ry. *v.* Union (1903) 158 Fed. 541; Arthur *v.* Oakes (1894) 63 Fed. 310.

[5]Aikens *v.* Wisconsin (1904) 195 U. S. 194; D. L. & W. Ry. *v.* Union *supra.*

[6]Lindsay *v.* Mont. Federation (1908) 37 Mont. 264; Parkinson *v.* Bldg. Trades (1908) 154 Cal. 581; Nat'l. Ass'n. *v.* Cummings (1902) 170 N. Y. 315.

[7]Arthur *v.* Oakes *supra;* Clemmit *v.* Watson (1895) 14 Ind. App. 38.

[8]Freund, Police Power, 335; Temperton *v.* Russel (1893) 1 Q. B. 715; Erle, Trade Unions, 5.

[9]Bailey *v.* Plumbers' Assn. (1899) 103 Tenn. 99; Hopkins *v.* Stove Co. (1897) 83 Fed. 913; opinion of Vann, J., in Nat'l Ass'n. *v.* Cummings *supra.*

[10]Aikens *v.* Wisconsin *supra;* Martin, Law of Labor Unions, 28; see Pickett *v.* Walsh (1906) 192 Mass. 572; but see cases *contra* in 18 Am. & Eng. Encyc. of Law 76.

[11]Plant *v.* Woods (1900) 176 Mass. 492; Erdman *v.* Mitchell (1903) 207 Pa. 79; Purvis *v.* Union (1906) 214 Pa. 348.

[12]See 2 COLUMBIA LAW REVIEW 552; 10 COLUMBIA LAW REVIEW 652.

consideration is the promotion of the interests of society as a whole,[13] the question is to be determined on social, economic and political principles, rather than upon strict legal reasoning.[14] Thus strikes for shorter hours, better wages, or protection from incompetent workmen are, of course, legal;[15] while those to compel the performance of an illegal act, or to entirely destroy the opportunities of others to earn a livelihood, are unlawful.[16] The storm centre at which there is the greatest conflict of judicial opinion is the question whether securing the closed shop is a lawful purpose.[17] The theory that such a purpose is within the scope of legitimate competition, and that a resulting injury is, therefore, *damnum absque injuria*, found expression in the recent case of *Kemp* v. *Division No. 241* (Ill. 1912) 99 N. E. 389. This view depends upon recognition of the present world-wide trend toward centralization and consolidation in all lines of endeavor,[18] regarding the solidification of the ranks of labor as permissible preparation for future conflicts with the opposing forces of capital which justifies any incidental injury to third parties.[19] This benefit to the union, however, is usually considered too remote and problematical to afford a justification for acts which deprive another of his right to work. Moreover, since the internal policy of a union is not subject to control by the courts,[20] and it cannot be compelled to accept any member whom it does not desire, labor unions, if free to exercise their power thus to secure the closed shop, will be able to perpetuate an absolute monopoly, a result abhorrent to common law theories of free competition.[21] A majority of jurisdictions, recognizing these considerations, have held that a strike to secure the closed shop is illegal,[22] but the contrary view has met with general approbation among text-writers.[23]

---

[13]Holmes, Privilege, Malice & Intent, 8 Harv. L. Rev. 1; Lewis, Closed Market & Union Shop, 18 Harv. L. Rev. 449.

[14]Holmes, J., in Vegelahn *v.* Guntner (1896) 167 Mass. 92.

[15]Wabash Ry. *v.* Hannahan (1903) 121 Fed. 563; Pickett *v.* Walsh *supra;* see Nat'l. Ass'n. *v.* Cummings *supra.*

[16]Brennan *v.* United Hatters (1906) 73 N. J. L. 729; Curran *v.* Galen (1897) 152 N. Y. 33; Thomas *v.* Ry. Co. (1894) 62 Fed. 803; Toledo Co. *v.* Penn. Co. (1893) 54 Fed. 730.

[17]Cook, Combinations, 60.

[18]Dissenting opinion of Holmes, J., in Vegelahn *v.* Guntner *supra.*

[19]Clemmit *v.* Watson *supra;* Lindsay *v.* Federation *supra;* Parkinson *v.* Bldg. Trades *supra;* Nat'l. Ass'n. *v.* Cummings *supra.*

[20]Mayer *v.* Ass'n. (1890) 47 N. J. Eq. 519.

[21]Wyman, Control of the Market, 86; Wolfe, Admission to Trade Unions, 30 Johns Hopkins Studies No. 3. p. 168.

[22]Perkins *v.* Pendleton *supra;* Lucke *v.* Clothing Cutters (1893) 77 Md. 396; Plant *v.* Woods *supra;* Erdman *v.* Mitchell *supra;* Purvis *v.* Union *supra;* Martin, Labor Unions, 39, 40.

[23]Cooke, Combinations, 60; Darling, Recent Decisions Affecting Labor Unions, 42 Am. L. Rev. 200; Smith, Crucial Issues in Labor Litigation, 20 Harv. L. Rev. 345, 356; Ames, Tort Because of Wrongful Motive, 18 Harv. L. Rev. 418. All strikes have been legalized by statute in England; 6 Edw. 7. c. 47; Stat. of Eng. (1905-06) p. 246; but see criticism of this act in Conway *v.* Wade (1908) 2 K. B. 844, 857. Labor unions are subject to the provisions of the Sherman Anti-Trust Act. Loewe *v.* Lawlor (1907) 208 U. S. 274.